Supreme Court, U.S.
FILED

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No. 021814 JUN 12 2003

In The

Supreme Court of the United States

CLIFTON P. GARDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED

I. Whether the conviction was obtained without the Defendant understanding the nature of the accusation.

II. Whether the conviction was obtained with complete disregard for the Defendant's right to be tried by a court which acted as an Article III court.

III. Whether the federal government can exercise a species of jurisdiction within an admitted state of the Union which strips citizens of their constitutionally protected rights when not acting in pursuance of Article I, Sec. 8, Cl. 17, of the Constitution.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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Appendix

Appendix A– Opinion and Order of the Ninth Circuit Court of Appeals, unpublished.

Appendix B – Opinion and Judgment of the District Court of Nevada, unpublished.

Appendix C – Order denying petition for rehearing en bank.

Appendix D – 90 PERCENT AND GROWING. (Material petitioner believes is Essential)

Appendix E – Transcript of trial before the District Judge (Order).

Appendix F – Constitutional Authorities set out Verbatim.

Petitioner, Cliftion P. Gardner, respectfully petitions for a writ of certiorari to review the Memorandum Decision and Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on Nov. 22, 2002 in order to resolve the questions presented regarding the deprivation of the Constitutionally protected rights of the Defendant/Petitioner. It is important to understand, it was not the intent of the Defendant and his family, to defy the government's demands and policy for purposes of obtaining free use of the range. To the contrary, the records show, that the Gardners were among the most cooperative permittees, running livestock on Forest Service lands from the inception of forest reserves in Nevada and up until the 1980's. The problem began when it became the policy of the agency people to disenfranchise the ranching community of grazing tenure and their vested water rights. From that point forward, all who resisted were persecuted and driven from their allotments. The Gardners were among those who were persecuted. Practice established pursuant to Congress' Art. IV authority provides no opportunity for a defense in this regard.

OPINIONS AND ORDERS ENTERED

The opinion of the Ninth Circuit Court of Appeals that gives rise to this petition is not reported, but is reproduced herein as Appendix A. The opinion of the District Court, not published, is reproduced herein as Appendix B. The Order denying petition for rehearing en banc is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on Nov. 22, 2002. Petition for rehearing en banc was denied on March 19, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec 1245.

CONSTITUTIONAL AUTHORITIES

Relevant constitutional authorities set out verbatim are attached as Appendix F.

STATEMENT OF THE CASE

This is a case of first impression. No one has previously asked whether the federal government can lawfully exercise a species of jurisdiction within an admitted state of the Union which strips citizens of their constitutionally protected rights when not acting in pursuance of Article I, Sec. 8, Cl. 17, of the Constitution.

On November 20, 2001, The Federal District Court for the District of Nevada found Cliff Gardner guilty of trespass. During proceedings, Gardner did not deny that he had been running his livestock on lands claimed by the U.S. Forest Service without a permit. Instead, Gardner challenged the federal government's jurisdiction, claiming that the federal government's authority under Article IV of the Constitution is plenary and without limitation and does not afford citizens made subject to such jurisdiction their constitutional rights, guarantees and protections, and therefore cannot be exercised within an admitted State of the Union.

Such jurisdiction has its origin in what has been referred to as the "Property Clause" (Article IV, Section 3, Clause 2, of the Constitution). The courts have held that this clause exempts Congress and the Executive Branch from having to comply with the rest of the Constitution's mandates and limitations when passing and implementing laws involving property belonging to the United States in territory outside the admitted States of the Union.

Cliff and Bertha Gardner and their family are not citizens of the United States living within a territory belonging to the United States. The Gardners are citizens of an admitted State of the Union, which State's municipal sovereignty and jurisdiction under the Constitution are meant to extend over all the territory within Nevada's boundaries and not to a mere 10 to 13 percent of the State.

If the assumption that the federal government can retain municipal sovereignty, jurisdiction and ownership over any amount of land it wishes when a State is admitted to the Union is correct, then it must be assumed as well, that under our constitution, States can be created where no private land or State jurisdiction exists at all. Nothing can be further from the truth. What's more, the Gardners believe that United States District Courts are courts which are organized under Article III of the Constitution. Article III, Section 2, of the Constitution does not allow Article III Courts cognizance over Article IV questions, particularly when a defendant does not waive his personal rights in a proceedings.

Believing this to be true, the Defendant entered into the proceedings challenging the court's jurisdiction and asking the court to make certain determinations regarding the situation described. To his dismay, the court proceeded with the prosecution without addressing the defendant's arguments; regarding the Defendant's request that he be afforded all of his rights which are guaranteed him under the Constitution; that the court act as a constitutional court rather than a legislative court when prosecuting the case; that the Defendant be afforded his right to understand the nature of the cause, as is provided for under the 6th Amendment to the Constitution; and that he be informed of the rules by which the court would be followed in the proceedings. (See Transcript of Proceedings, Appendix E.)

The Defendant argues that a citizen's right to Due Process and Right to Be Heard mean nothing if a judge chooses to ignore the Defendant's arguments, or acts as if the Defendant's arguments are invisible.

In *Marbury v. Madison, 5 U.S. (1Cronch) 137, 173; 2 L.Ed. 60 (1803)*, the Court said, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

By the unlawful exercise of Article IV jurisdiction within admitted States, Cliff Gardner and his family are being wrongfully deprived of their unalienable and God given rights which are meant to be safeguarded and protected by the Constitution of the United States, which rights include the right to by tried in a court which would act as a constitutional court rather than a legislative court.

By sanctioning the exercise of Article IV jurisdiction within admitted States, the Court itself has created a great paradox – a huge constitutional contradiction, which only the Judicial Branch itself can remedy.

The following text is but a summary of a more complete argument which is presented in Appendix D., a document titled, 90 PERCENT AND GROWING.

REASONS FOR GRANTING THE WRIT

The questions that are being brought in this case are not questions regarding paramount title or the equal footing doctrine per se, even though such issues and the issue regarding the loss of constitutionally protected rights are closely tied.

During the proceedings in this case, neither the court nor the government denied that the court was proceeding under the authority of Article IV of the Constitution. Neither did the court nor the government deny that it has been ruled that Article IV jurisdiction is plenary and without limitation and deprives citizens, made subject to such jurisdiction, of their constitutional rights, protections and guarantees. Neither did the court nor the government deny that it is the holding of the United States Supreme Court that Article III courts must safeguard the God given and unalienable rights of a defendant.

The question being, if it was an Article III or constitutional court that the Defendant was appearing before, why was it hearing an Article IV question - particularly when the Defendant made it clear from the beginning that he was not waiving any of his God given or constitutionally protected rights? And further, even if it is now accepted that Article III courts can hear Article IV questions, how can a defendant prepare a proper defense or obtain effective counsel under such a situation?

For example, if it is now accepted, that a constitutional court can hear Article IV questions, in such a situation, does the court look to case law involving Article IV decisions when rendering its decision, or does it look to law that has been set forth regarding constitutional matters when rendering its decisions? Or would the court draw from both kinds of legal precedents when rendering its decision?

During the proceedings, of November 20, 2001, the court did advise the Defendant of his right to be represented by counsel, his right to have counsel appointed and his right to remain silent, and the Defendant was informed and understood the cause of the accusation. But the Defendant was not informed, nor to this day has he been informed, nor does the Defendant understand the nature of the accusation; its full consequences, or how the Defendant is to prepare a proper and adequate defense in his behalf.

Under the 6th Amendment to the Constitution, the accused shall enjoy the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense". (Emphasis added.) Again, the Defendant does understand the cause of the accusation, or the source of authority by which the Forest Service and Justice Department were proceeding, and the Defendant understands why the Forest people and the Justice Department people believe they have been acting legitimately, but the Defendant certainly does not know or understand the nature of the accusation, nor how to prepare a proper and adequate defense in his behalf. Nor does the Defendant understand the full consequence of the action or accusation. The Defendant asks, what are the final and full consequences of an "without limitation prosecution" when a case is tried in a constitutional court; what can be expected, either during a proceedings, or after sentencing?

In addition, the Defendant does not understand the rules by which the court has been proceeding. The Defendant understands that in constitutional proceedings, that it is the constitution itself which sets forth the primary rules by which the court must proceed, while an Article IV proceeding, it is not necessary that the court follow the commands of the

Constitution.

So what are the rules that a constitutional court is to follow when it hears an Article IV matter? Could it be that a court, in this kind of a situation, can pick and choose the rules it is to follow when deciding a question - and if so, how is a Defendant to prepare a proper and effective defense in his behalf?

If court practice has now evolved to a point where a defendant is no longer able to determine the rules by which the court is proceeding, and he is unable to determine the full nature of the cause that is being brought against him, and there can be a mix of constitutional law and unlimited law, and the court is immune from having to address or discuss such a situation, then it appears to the Defendant that the Constitution and its protections and justice in general are lost to the people.

When States are admitted into the Union, the full Constitution of the United States comes into play, and when the Constitution comes into play, it is the citizens that are to be protected. States are not recognized and created for the purpose of protecting the States per se, States are created and a clear division or power is instituted for the purpose of protecting individuals.

As was so eloquently stated in *New York v. United States, 505 U.S. 144, 181; 112 S.Ct. 2408, 2431; 120 L.Ed. 2d 120 (1992)*:

> The Constitution does not protect the sovereignty of States for the benefit of the States or State governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. (Emphasis added.)

The courts have said repeatedly that when Congress exercises the authority that is granted it by the property Clause or Article IV, Sec. 3, Cl. 2 of the Constitution, it exercises the powers of both a State and the federal government. See *Gibson v. Chouteau, 80 U.S. (13 Will.) 92, 99, 20 L.Ed. 534 (1871); United States v. Gratiot. 39 U.S. (14 Pet.) 526, 537, 10 L.Ed. 573 (1840)*. When Article IV jurisdiction is exercised within a State, the citizens of that State are deprived of right to a division of power between the State and the federal government. (Emphasis added.)

As was further stated in *New York v. United States, 505 U.S. 144, 181; 112 S.Ct. 2408,. 2431; 120 L.Ed. 2d 120 (1992):*

> State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (Cites omitted.) Just as the separations and independence of the coordinated Branches of the Federal Government serve to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." (Cites omitted.) See also the *Federalist No. 51.* (Emphasis added.)

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50, 73 Led.2d 598, 102 S.Ct. 2858 (1982)*, the court quotes James Madison as follows:

> Basic to the constitutional structure established by the Framers was the recognition that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny," the *Federalist*

No. 47, p. 300 (H.Lodge Ed.1888) (J.Madison). (Emphasis added.)

It is not as if the U.S. Supreme Court has been unclear in recognizing and discussing the various kinds of jurisdiction which can be exercised by Congress. In *Hooven & Allison v. Evatt, 324 U.S. 652, 671; 65 S.Ct. 870, 879 (1945)*, the court said:

> The term "United States" may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution.

Nor has the Court been unclear in defining the various kinds of courts which are recognized.

In *Ex Parte Bakelite Corp. and Northern Pipeline Const. Co. v. Marathon Pipe Line Co., infra*, the Court went into great detail describing the difference between Article I courts, Article III courts and Article IV courts and how some are constitutional courts while others are legislative courts.

The U.S. Supreme Court has also made it clear that an Article IV court cannot operate or be created within an admitted state of the Union; nor can an Article III court act except in obedience or in conformity to the Constitution. *Benner v. Porter, 9 How. 235, 13 L.Ed 119 (1850), Downes v. Bidwell, 182 U.S. 244, 45 L.Ed. 1088, 21 S.Ct. 770 (1901), Northern Pipeline Col v. Marathon Pipe line, 458 U.S. 50, 102 S.Ct. 2858 (1982)* and *Ex Parte Bakelite Corp., 279 U.S. 438, 49 S.Ct. 411 (1929).*

Even so, during the sentencing hearing of February 21, 2001, Judge McKibben stated, "Article III, Section 2 of the United States Constitution provides in pertinent part as follows: 'The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made.' This portion of Article III Section 2 makes it clear that the judicial power was not limited to only certain sections of the Constitution. It extends to all sections of the Constitution, all laws of the United States, and all treaties."

This holding is incorrect, for if it were true, that the judicial power shall extend to all cases arising under the "laws" of the United States, it would mean that any law which was passed by Congress, no matter where it could be applied or whether it was made "in pursuance" to the Constitution's mandates or not, would be enforceable by any United States District Court. This we know cannot be true, for if it were, it would render the primary purpose of the Constitution meaningless. It would also render the decisions articulating the difference between Article III and Article IV jurisdiction meaningless.

In *Printz v. United States, 521 U.S., 898, 924; 117 S.Ct. 2365, 2379 (1997)*, Justice Scalia (when addressing the dissenting opinion of Justice Souter) wrote:

> The dissent perceives a simple answer in that portion of Article VI which requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution," arguing that by virtue of the Supremacy Clause this makes "not only the Constitution, but every law enacted by Congress as well," binding on state officers, including laws requiring state officer enforcement. Post, at 6. The Supremacy Clause, however, makes "Law of the Land" only "Laws of the

> United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

The Supremacy Clause reads, "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be Supreme Law of the Land..." (Emphasis added.)

It is the phrase, "and... laws...which shall be made in pursuance thereof", that is controlling. In other words, if an act is not made in "pursuance" to the Constitution's mandates, the act is null and void upon its passage. Just because an act is passed by Congress does not mean that it can be enforced within an admitted State of the Union, or against citizens living within an admitted State of the Union, or by a court that is organized under the third article of the Constitution.

Judge McKibben's statement, while on its face seems reasonable, does not take into account the pronouncements of the Supreme Court regarding the bestowal of power upon the various lower courts by Congress under Article III and Article IV of the Constitution.

Article III, Section 2, of the United States Constitution does not allow Article III courts cognizance over Article IV questions, as was said in *Benner v. Porter, supra:*

> As the only judicial power vested in Congress is to create courts whose judges shall hold their office during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a

limited time, it must act independently of the Constitution and upon territory which is not part of the United Sates within the meaning of the Constitution.

The Power to make needful rules and regulations would certainly not authorize anything inconsistent with the Constitution if it [the Constitution] applied to the territories. Certainly no such court could be created within a state, except under the restrictions of the judicial clause. (Emphasis added.)

In *Downes v. Bidwell, supra,* the court said:

The Admission of the State into the Union brought the territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument.

The territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the federal government could be deposited. They were incapable of receiving it... Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a state. (Emphasis added.)

Justice Van Devanter in delivering the opinion for the Court in *Ex Parte Bakelite Corp., 279 US 438, 448; 49 S.Ct. 411, 412 (1929),* wrote:

...it long has been settled that article 3 does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion

of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers, and are prescribed by Congress independently of section 2 of article 3...

The first pronouncement on the subject by this Court was in *American Insurance Co. v. Canter, 1 Pet. 511*, where the status and jurisdiction of courts created by Congress for the Territory of Florida were drawn in question. Chief Justice Marshall, speaking for the court, said (page 546):

> 'These Courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the

> execution of those general powers which that body possesses over the territories of the United State.'
>
> That ruling has been accepted and applied from that time to the present in cases relating to territorial courts. A like view has been taken of status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district to make the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of article 3, but are merely in aid of legislative or executive action and therefore outside the admissible jurisdiction of courts established under that article. (Emphasis added.)

These decisions have not been overturned. In *Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858 (1982)*, Justice Brennan wrote at [458 US 64]:

> ...the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government. For example, in American Ins. Co. v Canter, ...the Court observed that Art IV bestowed upon Congress alone a complete power of government over territories not within the States that comprised the United States. The Court then acknowledged Congress' authority to create courts for those territories that were not in conformity with Art III. Such courts were "created in virtue of the general right of sovereignty which exist in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory

belonging to the United States. The jurisdiction with which they are invested... is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government." 1 Pet. At 546, 7 L Ed 242.

The Court followed the same reasoning when it reviewed Congress' creation of non-Art III courts in the District of Columbia. It noted that there was in the District "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." (Citing to *Kendall v. United States, 12 Pet 524, 619, 9 L Ed 1181 (1838).* (Emphasis added.)

The fact that there is no guarantee that persons will be afforded their God given and unalienable rights when they are made subject to Article IV jurisdiction can be seen in, *Murphy v. Ramsey, 114 U.S. 15, 44 [29: 47, 57] (1884); The Church of Jeseus Christ of Later-Day Saints v. U.S., 136 U.S. 1, 34 L.Ed. Ed., 10 S.Ct. Rep. 792 (1890); Downes v. Bidwell, 182, U.S. 244, supra; Dorr v. United States, 195 U.S. 138, 49 L.Ed. 128, 24 S.Ct. 808, Ann Cas 697 (1904); Dowdell v. United States, 221 U.S. 325, 55, L.Ed. 753, 31 S.Ct.590 (1911); Ocampo v. United States, 234 U.S. 91, 98 L,Ed. 1231, 34 S.Ct. 712 (1914);* and *Hooven & Allison v. Evatt, 324 U.S.652, 65 S.Ct. 870, 98*

L.Ed. 1252 (1944).

The fact that it has now become accepted by the courts, that Article IV or Territorial jurisdiction can be exercised within admitted States and that such power, even under this application, continues to be applied as a power that is without limitation can be seen in; *Camfield v. United States, 167 U.S. 518, 17 S,Ct. 864, 42 L.Ed. 260, (1897); Light v. United States, 220 U.S. 523, 31 S.Ct. 485, 488, 55 L.Ed. 570 (1911); F.C.P. v. Idaho Power Co., 344 U.S. 17, 73 S.Ct. 85, 87, 97 L.Ed. 15 (1952); Alabama v. Texas, 374 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689 (1954); Kleppe v. New Mexico, 426 U.S. 529, 49 L.Ed. 2d 34 (1976);* and *California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 94 L.Ed. 2d 577, 107 S.Ct. 1419 (1987).*

In *Hooven & Allison v. Evatt, 324 U.S. 652, 65 S Ct 870, 89 L Ed 1252 (1944),* the Court said:

> In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States... And in general the guaranties of the Constitution, save as they are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the Unites States, has made those guaranties applicable.

The 9th Circuit Court in *United States v. Gardner, 107 F.3d 1314 (9th Cir. 1996),* made reference to the decisions in *United States v Texas, 339 U.S. 707, 70 S. Ct. 918, 94 L.Ed. 122, 1 (1950)* and *Coyle v. Smtih, 221 U.S., 559, 31 S. Ct. 688, 55 L.Ed. 853 (1911),* stating that "the purpose of the equal footing doctrine is not to eradicate all diversity among states but rather to establish equality among the states with regards to political

standing and sovereignty."

This is precisely our point. It is true, the Equal Footing Doctrine does not guarantee economic equality among States. However, a State cannot be said to be sovereign over its territory, or within its realm of authority which is recognized by the Constitution, when it is said that the federal government's authority over the majority of a State's lands, is a power that is without limitation; that it exercises both the powers of a State and of the federal government; and that all State law must yield when it is found to be in conflict with federal law. Such a notion is not supported by the *Pollard v. Hagan* case, wherein it is stated that a State is not placed on an equal footing with its sister States until such time that it exercises all of the municipal sovereignty, jurisdiction and eminent domain over all of the lands within its limits. It is not supported by the *Pollard v Hagan* case, the *Coyle v. Smith* case, nor the *Shively v. Bawlby* case wherein it is stated that Alabama and other new States are entitled to the sovereignty and jurisdiction over all the territory which lays within their limits. It is not supported by the *Pollard v. Hagan* case wherein "eminent domain" as used therein, is defined as "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain." Nor is it supported by the *Pollard v. Hagan* case or the *Shivley v. Bowlby* case wherein it is stated that there are only two ways under which the federal government can hold territory under the Constitution. One being by the authority of Art. I, Sec. 8, Cl. 17, and the other being by compact or treaty - which in this instance, by the Treaty of Guadalupe Hidalgo and the treaty for the purchase of the Louisiana Territory, there is no authority given for the federal government to retain lands after a state is admitted to the Union. *Shively v. Bowlby, 152 U.S. 1, 38 L.Ed. 331, 14 S.Ct. Rep. 548 (1894), Pollard v. Hagan, 44 U.S. 212, 3 How. 212, 11 L.Ed. 565 (1845), Coyle v. Smith, 31*

S.Ct. 688, 55 L.Ed. 853 (1911). (See argument and discussion beginning on page 10, of Appendix D.)

Upon the adoption of the Constitution, there were three sovereigns recognized. First, there was the States with their Police Powers. Then there was created a federal government with its Enumerated Powers. But most important was the residue of power which was left to the people, who's God given rights cannot be infringed by either the States or the Federal Government; which include the peoples right to be protected by the Separations of Powers Doctrine, the right of local self government, the right to be protected by the Treaty Clause that is written into Article III, Sec. 2 and Article VI, Cl. 2, of the Constitution, the right to be tried by a Common Law court, as well as all other rights which are provided for under the Constitution and Bill of Rights and which are defined by Common Law.

Neither is there political equality for the citizens of Nevada. By controlling the vast majority of the State's lands and resources, the federal government easily controls the politics of the State, thus jeopardizing the freedom, liberty and independence of the people.

In the *Report Of The Interdepartmental Committee For The Study Of Jurisdiction Over Federal Areas Within The States, Part II, June 1957*, pages 19, 20,and 21, is the following discussion and record of the Constitutional Convention:

> The genesis of Article I, Section 8, Clause 17, of the Constitution, is to be found in the proposals made by Madison and Pinchney on August 18, 1787... On September 5, 1787, the committee of eleven, to whom the proposals of Madison and Pinchney had been Referred, proposed that the following power be granted to

Congress:

> To exercise exclusive legislation in all cases whatsoever over such district (not to exceeding ten miles square) as may, by cession of particular states and the acceptance of the legislature, become the seat of government for the United States; and to exercise like authority over all places purchased for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

...The debate concerning the proposal of the committee of eleven was brief, and agreement concerning it was reached quickly, on the day of the submission of the proposal to the Convention. The substance of the debate concerning this provision was reported by Madison as follows:

> So much of the fourth clause as related to the seat of government was agreed to, *nem. com.*
>
> On the residue, to wit, "to exercise like authority over all places purchased for forts, &c."
>
> **MR. GERRY** contended that this power might be made use of to enslave any particular state by buying up its territory, and the strongholds proposed would be a means of awing the state into an undue obedience to the general government.
>
> **MR. KING** thought himself the provision unnecessary, the power being already involved; but would move to insert, after the word "purchased," the words, "by the consent of the legislature of the state." This would certainly make

> the power safe.
>
> **MR. GOVERNEUR MORRIS** seconded the motion, which was agreed to, *nem. com.*; as was then the residue of the clause, as amended.

The report goes on to state, "There appears to be no question but that the requirement was added simply to foreclose the possibility that a State might be destroyed by the purchase by the Federal Government of all of the property within the State."

By this record, that it is made abundantly clear, it was the intent of the Founders to stop the Federal Government from acquiring or holding any land within admitted states except by the authority of Art. I, sec. 8, Cl. 17.

As was stated by Hamilton, in the Federalist No. 79, p. 491 (1881), "In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

What the Founders feared has come true; today in Nevada and in other Western States, almost everyone's economic well-being is dependant upon the permitting processes of the Federal Government. Recognition of State and Common Law rights are shorn away by the exercise of Congress' so called Article IV jurisdiction. There is no recognition for state recognized property interest. There is no security. There are only permits which are issued by the Feds, which can be withheld or canceled at any time. Mining, ranching and timbering interest, and even those who depend on the public lands for recreational opportunity have learned, that in order to survive, "they must keep their heads down and their mouths shut". This puts the Feds in near complete control, both politically and economically. It also feeds corruption, for when so much power is placed in the hands of a central government, whereby a mere permit,

either granted or withheld, can make or break an individual or business, payoffs emerge; be they political or otherwise. In Nevada today, most of the payoffs are political, for whoever supports the Federal Government and its policy fares best in the outcome of their enterprise. Which leads to a situation whereby the Feds are becoming stronger and stronger while the private sector is becoming more and more subdued.

When the Defendant was brought before the magistrate judge on trespass charged on June 15, 2000, he objected to having a magistrate judge decide the case and asked that the case be tried by a Federal District Court Judge. To the Defendant's dismay, when he did appear before the District Court later, the District Court Judge also acted as a legislative judge, rather than a constitutional judge. And so, when the Defendant was brought before the magistrate judge a second time on trespass charges, on September 20, 2001, the Defendant made it clear, that he was not objecting to being tried by a magistrate judge so that his case would be assigned to a Federal District Judge necessarily - but instead, was requesting that the case be tried by a court which would act as a constitutional court, or one which would act in full obedience to the Constitution.

Soon after, the Defendant received notice that he was to appear before the Federal District Court in Reno, Nevada on Nov. 20, 2001. It was with great apprehension that the Defendant appeared on Nov. 20, for he knew by then, that it could be expected that the court would not act in recognition of his constitutionally protected rights.

In *Peretz v. United States, 501 U.S. 923, 111 S. Ct. 2661 (1991), United States v. Raddatz, 447 U.S. 667 (1980)* and *Gomez v. United States, 490 U.S. 858 (1989),* the Court confirmed the right if citizens to be heard by a court which is organized under the authority of Articale III. As cited in the

Peretz case, (absence of objection constitutes waiver of right to be present at all stage of criminal trial) see *United States v. Gagnon, 470 U.S. 522, 528 (1985);* failure to object to closing of courtroom is waiver of right to public trial) *Levine v. United States, 362 U.S. 610, 619 (1960)*; (failure to object constitutes waiver of Forth Amendment right against unlawful search and seizure) *Segurola v. United States, 275 U.S. 106, 111 (1927)*; (failure to object constitutes waiver of Fifth Amendment claim) *United States v. Coleman, 707, F. 2d 374, 376 (CA9).* By these cases it is made abundantly clear; a primary reason for the right of persons to appear before an Article III court is so that such persons may be afforded their rights which are recognized and protected by the Constitution.

Even if it were assumed that Article III courts can undertake the prosecution of an individual pursuant to Article IV, certainly such prosecution cannot occur when a defendant does not waive his constitutionally protected rights.

In this instant case the Defendant stated during the proceedings, that he was not waiving any of his God given or unalienable rights which are protected by the Constitution. In addition the Defendant submitted a list of rights to the court asking that the court expound on each of the listed rights as though they were individual arguments presented to the court. Yet the court ignored the Defendant's request.

Following is the list of rights which the Defendant submitted during the initial hearing and during trial. Again, in this appeal, the Defendant asks, is it not true that a citizen of an admitted State of the Union cannot, under the Constitution, be deprived of the following rights when the federal government is not acting in pursuance of Article I, Sec. 8, Cl. 17, of the United States Constitution?

1. The right to be tried by a court which acts as a Constitutional Court rather than a Legislative Court.

2. The right to be treated as a citizen of an admitted State of the Union rather than a citizen of a Territory.

3. The right to be governed by State and Common Law, (including the right to have property in public lands defined by State and Common Law).

4. The right to be protected by the 6th Amendment to be informed of the nature of the charges.

5. The right to have municipal government exercised at the local level rather than by the Nation as a whole.

6. The right of the Defendant to be judged by his peers at the local level, rather than at the Federal District level. *See footnote 1, below.*

7. The right of the Defendant to be protected by the 10th Amendment to the Constitution, wherein the powers of the Federal Government are limited and enumerated.

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1. Our forefathers felt that in order to have justice, it is obvious that a jury of peers must be people who actually know the defendant. Patrick Henry said; "What is meant by peers? Those who reside near him, his neighbors, and who are well acquainted with his character and situation in life." (Elliot, 3:579)

Mr. Holmes, from Massachusetts, argued strenuously that for justice to prevail, the case must be heard in the vicinity where the fact was committed by a jury of peers. "...a jury of the peers would, from their local situation, have an opportunity to form a judgment of the character of the person charged with the crime, and also to judge of the credibility of the witnesses." (Elliot, 2:110).

8. The right of the Defendant to be protected by the Bill of Rights and the Constitution in their entirety, and not in some instances and not others.

9. The right of the Defendant to be protected by the Guarantee Clause of the Constitution, Article IV, Sec. 4; and Article IV, Section 2, which guarantee the "Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the Several States. (See argument and discussion beginning at page 61 of Appendix D.)

10. The right of the Defendant to be protected by Article I, Section 8, Clause 17 of the Constitution, which guarantees that no land be acquired or municipal jurisdiction be exercised within a State except by purchase, and by consent of the legislature.

11. The right of the Defendant to have the Constitution interpreted and enforced in accordance to the Founder's original intent, whereas the language incorporated within Article I, Section 8, Clause 17, as Mr. Gerry said during the Constitutional Convention, was to prevent the Federal Government from obtaining such power that it "Might be made use of to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the general government."

Mr. Wilson, signer of "The unanimous Declaration," who also later became a Supreme Court Justice, stressed the importance of the jurors knowing personally both the defendant and the witnesses. "Where jurors can be acquainted with the characters of the parties and the witnesses - where the whole cause can be brought within their knowledge and their view - I know no mode of investigation equal to that by a trial by jury:...the jurors may indeed return a mistaken or ill-founded verdict, but their errors cannot be systematical." (Elliot, 2:516)

12. The right of the Defendant to have his rights protected as unalienable God given rights, rather than as federally granted rights, which can be taken from him at any time by a later act of Congress.

13. The right of the Defendant to be protected by the Treaty Clause of the Constitution which is incorporated within Article III of the Constitution, and subsequently, Article IX of the Treaty of Guadalupe Hidalgo, which states that the Mexicans [or persons living therein] "shall be incorporated into the Union of the United States..., to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution". (See argument beginning at page 29, Appendix D.)

14. The right of the Defendant to be protected by a division of power between the Federal and State governments, as is recognized in *New York v. United States, 505 U.S. 144, 112 S. Ct. 2408 120 L Ed. 2d 120 (1992)*, wherein the Court said, "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between the federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power". *Coleman v. Thompson, 501 U.S. 722, 114 L ed 2d 640, 111 S Ct 2546 (1991)*. "Just as the separations and independence of the coordinated Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ahcroft, 501 U.S., at 422, 155 L ed 2d 120, 112 S Ct (1992).*

15. The right of the Defendant to be heard by a court which shall address each argument raised, in detail, as has been acknowledged in *Marbury v. Madison, 1 Cranch (5 U.S. 137 (1803),* wherein the Court said, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

Is it not true, that a defendant's right to appear before an Article III court rather than a magistrate court has as much to do with the defendant's right to appear before a court which acts in full obedience to the Constitution and the right to have one's rights protected by that instrument, as it has to do with the right of a defendant to appear before a judge who is appointed for life?

What of the Defendant's right to have his rights protected as unalienable, God given rights rather than as federally granted rights which can be taken from him an any time by a majority vote of Congress?

How can the courts reconcile the federal government's control and retention of such a vast amounts of land within so many of the Western States when it was so clearly stated during the Constitutional Convention that the acquisition of great amounts of land within Sates was to be prevented, for the power, as Mr. Gerry contended, "Might be made use of to enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the state into an undue obedience to the general government"?

Can anyone deny that Defendant was denied his right to a State's governance which was free from federal political dominance? Can anyone deny that whenever one interest owns

or control the vast majority of the wealth within a community that it most often controls the politics of that community as well?

How can the court reconcile the language that is incorporated within the Treaty of Guadalupe Hidalgo which states that the Mexicans [persons living therein] "shall be incorporated into the Union of the United States, and be admitted at the proper time to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution..." with the situation that exists today?

How can it be said that Nevada is being treated as a Sovereign State when it is assumed that the federal government can buy any amount of land it wishes, at any time it wishes within the State, and then exercise absolute and unlimited jurisdiction over such land without obtaining the consent of the State's Legislature? How can the courts reconcile this with the intent of Article 1, Section 8, Clause 17 of the Constitution?

Are we to believe that the Founders would have agreed that it was lawful for the federal government to forever own and control, without limited authority, vast amounts the lands within admitted States?

Can anyone deny that the original intent of Article 1, Section 8, Clause 17, the 10th Amendment, and the Constitution in its entirety, have been corrupted and nullified by the accepted exercise of Article IV jurisdiction within admitted States?

How can it be said that citizens living in the State of Nevada are equal under the privileges and immunities clause which is incorporated within Article IV, Sec 2, of the Constitution, when the people are denied their right to exercise municipal government at the local level to the same degree and in the same

manner as are citizens living in the original States? (See argument beginning at page 61 of Appendix D.)

And how can it be said that Nevada is a Sovereign State when it is assumed that the federal government retains sovereignty over the waters of the State - and Nevada only exercises authority over the water that lay within its borders by the authority of Article IV of the Constitution and the Act of 1866? (See argument beginning at page 45, Appendix D.)

And how can it be said that Nevada is a Sovereign State when it is assumed that federal law can and does override conflicting state law on 87 percent or more of the land that lays within its borders? (See *California Costal Comm. v. Granite Rock, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed. 2d 577 (1987)*)

And is it not true, that because of the exercise of Article IV jurisdiction within admitted States, persons such as the Gardners are deprived of having their rights to graze within their allotments recognized by State and common law?

Is it not true, that if an Article III court must act in full obedience to the Constitution and the Forest Service must act in accordance to that law which is promulgated in pursuance of Congress's so called Article IV, jurisdiction, which deprives citizens of their constitutional right protections and guarantees, then in fact, and Article III court cannot hear an Article IV matter?

Was James Madison so wrong when he stated, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny"?

Was the Court so wrong when it said in *New York v. United States* case, that "Just as the separations and independence of the coordinated Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front"?

CONCLUSION

The Petitioner sees this case as the most important case to come before the Court since the Constitution itself was adopted; for what are the implications of a practice which strips persons of their constitutional protections, over ever increasing areas of our nation, if it is not a means of destroying our constitutional form of government?

Certainly, a ruling in favor of the Petitioner would be far reaching and disruptive to many governmental institutions. However, the consequence of continuing the unconstitutional practices, herein addressed, will certainly bring about the destruction of our free and prosperous nation.

For the foregoing reasons, Petitioner respectfully requests that this petition for writ of certiorari be granted.

Dated the 4th day of June, 2003.

Respectfully submitted,

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